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Term 'boy' is proof of racial animus

Plaintiff can only hope U.S. Supreme Court will overrule the 11th Circuit for a second time

By STEPHEN BRIGHT
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The 11th U.S. Circuit Court of Appeals' third ruling that a white supervisor calling black men "boy"—as in "Boy, you better get going" and "hey, boy"—is not evidence of racial animus was issued last week by Judges Edward E. Carnes and William H. Pryor Jr. in an unsigned, unpublished opinion. Carnes and Pryor are white men and alumni of the Alabama attorney general's office.

The third judge on the panel, a visiting senior district judge from Ohio appointed by President Ronald Reagan, dissented. He would have upheld a jury verdict finding that Tyson Foods discriminated against a black man, John Hithon, in not promoting him to position as a shift manager at Tyson's chicken processing plant in Gadsden, Ala., and awarding damages of more than $1 million to Hithon.

The extraordinary conclusion that there is nothing racial in calling black men "boy" was reached in two earlier decisions by panels that involved Carnes and two other white men on the court, Judges Joel F. Dubina, also from Alabama, and Stanley Marcus of Florida. The most recent opinion was the second time the 11th Circuit substituted its opinion for that of Alabama federal juries that awarded more than $1 million to Hithon for employment discrimination by Tyson Foods. (Alyson M. Palmer provided an excellent report on the case in the Daily Report, "11th Circuit: Term 'boy' doesn't prove race discrimination," published Aug. 20.) The case is *Ash v. Tyson Foods*, 2010 WL 3244920 (11th Cir. No. 08-16135.)

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The panel of Carnes, Dubina and Marcus originally held that "[w]hile the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone is not evidence of discrimination." It also applied an absurdly demanding standard for establishing that the reason for promoting the white applicant over the black one was pretextual: The plaintiff must show "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." *Ash v. Tyson Foods*, 129 Fed. Appx. 529, 536, 2005 U.S. App. LEXIS 7219 (2005).

The U.S. Supreme Court summarily and unanimously reversed both holdings. *Ash v. Tyson Foods*, 546 U.S. 454, 456 (2006). It made it clear that use of the term "boy" is not "always benign" and "[t]he visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications."

Two years later the U.S. Supreme Court reviewed a decision of the Louisiana Supreme Court, in which that court had dismissed a claim of racial discrimination based on a prosecutor's comparison of a black defendant with O.J. Simpson, saying that it was not an appeal to race because the prosecutor did not mention the race of either Simpson or the defendant. During oral argument (I was representing the petitioner), Justice David Souter pointed to that part of the opinion and suggested to the lawyer for Louisiana that this did not appear to be "a critical mind at work." (The court reversed. The case was *Snyder v. Louisiana*, 552 U.S. 472 (2008).)

But critical minds were at work at the 11th Circuit. On remand from the Supreme Court, the

original panel, in another *per curiam* opinion, still managed to conclude that the use of "boy" did not support an inference of racial animus and the evidence was insufficient to establish pretext.

They parsed away, as only good and dedicated lawyers can do, to isolate "boy" from history, context and the chicken processing plant where the slur was used. The issue, they explained, was not whether the term was offensive to the two black men who were called "boy," but what was in the white plant manager's mind in using the word in addressing them. From the cold record, the appellate judges discerned that the manager's use of "boy" was only "conversational," "ambiguous stray remarks."

Moreover, addressing the black men as "boy" was not done in the "context of decisions at issue." In other words, employers can refer the black men who work for them as "boy" so long as they do not use the word during a promotion or hiring decision. And, remarkably, the panel decided that it did not need to be slapped in the face to conclude that the evidence of comparative qualifications did not establish discrimination. The court actually did not need a standard at all. *Ash v. Tyson Foods*, 190 Fed. Appx. 924, 926, 2006 U.S. App. LEXIS 19750 (11th Cir. 2006). In short, it parsed its way right around the Supreme Court's opinion as if it were nothing more than a small speed bump on the road to getting back to its original result.

In last week's opinion, Carnes and Pryor even had the arrogance to chastise the lawyer for the plaintiff for trying to elicit testimony comparing the use of "boy" to the racial slur "nigger." Carnes and Pryor found it "highly improper" to inject such an "emotionally charged" word into a trial, even as they played down the emotional charge of the word "boy." These two white judges, residing in their judicial palaces as far away from the lives of ordinary people as one can get, purport to know more about what it means when a white overseer calls an African-American man "boy" than 24 Alabamians selected for two federal juries.

Alabama juries are not known for being generous in employment discrimination cases—or any other kind of discrimination cases. But Carnes and Pryor—and many of their colleagues—do not see the federal courts as a place where businesses like Tyson Foods must answer for their discrimination against black people in promoting employees.

Mercifully, Judges Elbert Tuttle, Frank Johnson and John Minor Wisdom and many—although not all—of the other great members of the 11th and former 5th Circuit who did so much to advance civil rights are not alive to see this sad, sad day.

This march back to Jim Crow would surely be more difficult if there were more people of color on the federal bench. About a quarter of the population of three states that make up the 11th Circuit are African Americans and Hispanics. Yet there have been only two black judges on the 12-member 11th Circuit in its history, and they have served one at a time. There is only one active African-American federal judge in all of Georgia today, Judge W. Louis Sands in the Middle District. The Northern District of Georgia, which includes Atlanta and has three African Americans representing it in Congress, has no African American judges in active status at this time.

The 11-member court has had only two in its history, Horace T. Ward and Clarence Cooper. Ward was appointed in 1979 and took senior status in 1994. Cooper was appointed in 1994 and took senior status in 2009. President Barack Obama has nominated Steve Jones, an African-American man, and Amy Totenberg, a white woman, for judgeships on the Northern District. There are two vacancies on the court awaiting nominations. There has never been an African-American woman on any federal district court in Georgia or the 11th Circuit. Perhaps Obama will correct this with his remaining appointments to the Northern District.

In the meantime, Hithon, the victim of discrimination at Tyson Foods, and people who care about the federal courts enforcing the civil rights laws—and the way in which people are treated in the workplace and in society—must hope that the Supreme Court will grant review in *Ash v. Tyson* Foods and reverse the 11th Circuit for a second time.